



INTERIOR BOARD OF INDIAN APPEALS

Estate of Lena Abbie Big Bear Yellow Eagle

17 IBIA 237 (08/21/1989)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF LENA ABBIE BIG BEAR YELLOW EAGLE

IBIA 89-27

Decided August 21, 1989

Appeal from an order denying rehearing issued by Administrative Law Judge Sam E. Taylor in Indian Probate IP OK 71 P 87.

Affirmed.

1. Indian Probate: Wills: Publication

There is no requirement in 43 CFR 4.260 that an Indian testatrix publish her will by declaring to the witnesses that it is her last will and testament or that she be the person who requests the witnesses to sign.

APPEARANCES: Jim Merz, Esq., Oklahoma City, Oklahoma, for appellants; Amos E. Black III, Esq., Anadarko, Oklahoma, for appellees.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

On April 17, 1989, the Board of Indian Appeals (Board) received a notice of appeal from Rufus Yellow Eagle, Ida Yellow Eagle Burns, Flora Yellow Eagle Reuben, Beulah Yellow Eagle Penn, and Minnie Yellow Eagle (appellants), seeking review of a February 16, 1989, order denying rehearing issued by Administrative Law Judge Sam E. Taylor in the estate of Lena Abbie Big Bear Yellow Eagle (decedent). For the reasons discussed below, the Board affirms that decision.

Background

Decedent, Cheyenne Unallottee 801U5843, was born on August 12, 1903, and died on January 20, 1986. Hearings to probate her trust estate were held by Judge Taylor on September 7, October 21, and December 9, 1987. Testimony showed that decedent had nine children, two of whom predeceased her. Decedent's surviving children were Rose Yellow Eagle Wassana, John Leonard Yellow Eagle, Jr., and the present appellants. Her predeceased children were Andrew Yellow Eagle, Sr., and Delos Yellow Eagle. Andrew Yellow Eagle, Sr., was survived by issue; Delos Yellow Eagle was not.

Evidence was presented at the hearing indicating that decedent had executed a will on February 21, 1984. Under this will, decedent divided her entire trust estate between Rose Yellow Eagle Wassana and John Leonard

Yellow Eagle, Jr. (appellees). Appellants contested decedent's will on the grounds that she was not competent and was acting under undue influence when she executed the will, and the will was not properly witnessed.

By order dated October 31, 1988, Judge Taylor found against appellants and approved decedent's will. Appellants sought rehearing on the ground that the will was not properly executed. By order dated February 16, 1989, Judge Taylor denied rehearing, noting that appellants had not alleged any new evidence in the petition for rehearing.

The Board received appellants' notice of appeal from Judge Taylor's order denying rehearing on April 17, 1989. Both appellants and appellees have filed briefs on appeal.

Discussion and Conclusions

On appeal, appellants argue only that the will was not properly executed because it was not published, *i.e.*, decedent did not state to the attesting witnesses that the document she was asking them to witness was her will, and decedent did not request them to sign as witnesses. Appellants conclude that publication and a request from decedent were required by reading 43 CFR 4.233(a) and 43 CFR 4.260(a) together.

43 CFR 4.233(a) provides procedures for making an Indian will devising trust property self-proved. The section contains sample affidavits to be signed by the testator and the witnesses, and requires that the affidavits be attached to the will and be in form and content substantially as shown in the samples. The section further provides that the completion and attachment of such affidavits will make the testimony of the will witnesses unnecessary if the will is not contested. 43 CFR 4.260(a) (53 FR 48648 (Dec. 2, 1988)) sets forth the requirements for execution of an Indian will devising trust property, and provides that "[a]n Indian of the age of 18 years or over and of testamentary capacity, who has any right, title, or interest in trust property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses."

[1] The Board has previously held that under 43 CFR 4.260(a) an Indian testator is required neither to publish his or her will nor to be the person to request the witnesses to sign in order for the will to be properly executed. *See, e.g., Estate of Carrie Standing Haddon Miller*, 10 IBIA 128 (1982), and cases cited therein. Appellants argue, however, that language relating to publication and a request to the witnesses, found in the sample affidavit to accompany Indian will in 43 CFR 4.233(a), must be read in conjunction with 43 CFR 4.260(a) so that publication and a request from the testator become two of the formalities of execution required for a valid Indian will.

Section 4.260(a) sets forth the requirements the Secretary has deemed necessary to ensure valid execution of an Indian will devising trust property. Section 4.233(a), which is intended to memorialize the facts surrounding the execution of the will, states that the language used in an affidavit to accompany Indian will must be "substantially" the same in form

and content as the sample affidavits. If BIA is not required to follow the language in the sample affidavits precisely, neither those samples nor section 4.233(a) could possibly impose additional will execution requirements not found elsewhere in the regulations. At most, the will scrivener should perhaps have crossed out the language relating to publication and a request to sign before using BIA's standard form affidavit, which is identical to the sample affidavit set out in section 4.233(a). Such a failure cannot, however, serve to impose will execution requirements not otherwise mandated.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the February 16, 1989, decision of Judge Taylor is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge